

1 WO
2
3
4
5

6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 International Society for the Protection } No. CV-22-08114-PCT-SPL
9 of Mustangs and Burros, }
10 Plaintiff, }
11 vs. }
12 United States Department of }
13 Agriculture, et al., }
14 Defendants. }
15

ORDER

16 Before the Court is Plaintiff International Society for the Protection of Mustangs
17 and Burros’ (“Plaintiff”) Motion for Temporary Restraining Order¹ (Doc. 13). Plaintiff
18 alleges that Defendants have captured and impounded certain horses found on the Apache
19 National Forest. Plaintiff asserts that Defendants plan to hold a public sale of the horses
20 and seeks a temporary restraining order (“TRO”) enjoining Defendants from doing so.

21 **I. BACKGROUND**

22 On June 28, 2022, Plaintiff filed a Complaint (Doc. 1), seeking declaratory relief as
23 it relates to the United States Forest Service’s alleged capture, removal, and impending sale
24 of horses found on Apache National Forest land.² On July 12, 2022, Plaintiff filed this

25 ¹ In its request, Plaintiff asks that Defendants be called to show cause why a
26 preliminary injunction should not issue. This improperly shifts the burden for seeking an
27 injunction, which resides with the moving party. Therefore, for purposes of this motion,
the Court has treated Plaintiff’s Motion for TRO as a Motion for Preliminary Injunction
because the standard is the same for each.

28 ² Plaintiff has since filed an Amended Complaint (Doc. 11).

1 Motion requesting the issuance of a TRO preventing Defendants from selling the horses.
 2 (Doc. 13 at 1–2). According to Plaintiff, the horses are not “unauthorized livestock”—as
 3 Defendants claim—but rather wild, free-roaming horses that are federally protected. (*Id.* at
 4 2). Plaintiff asserts that their removal and sale violates the National Environmental Policy
 5 Act, the Wild Free-Roaming Horses and Burros Act of 1971, and the Administrative
 6 Procedures Act. (*Id.* at 5). The sale of the horses is currently scheduled for July 14, 20, and
 7 21, 2022. (*Id.* at 1).

8 **II. LEGAL STANDARD AND DISCUSSION**

9 A request for a TRO is analyzed under the same standards as a request for a
 10 preliminary injunction. *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240
 11 F.3d 832, 839 n.7 (9th Cir. 2001). “A preliminary injunction is ‘an extraordinary and drastic
 12 remedy, one that should not be granted unless the movant, by a clear showing, carries the
 13 burden of persuasion.’” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting
 14 *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (emphasis omitted)); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted) (“A
 15 preliminary injunction is an extraordinary remedy never awarded as of right”). A party
 16 seeking injunctive relief under Rule 65 of the Federal Rules of Civil Procedure must show
 17 that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the
 18 absence of injunctive relief; (3) the balance of equities tips in its favor; and (4) an injunction
 19 is in the public interest.³ *Winter*, 555 U.S. at 20; *Stuhlbarg*, 240 F.3d at 839, n.7; *Pom*
 20 *Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014); *Pimentel v. Dreyfus*, 670
 21 F.3d 1096, 1105–06 (9th Cir. 2012). Where a movant seeks a mandatory—rather than a
 22 prohibitory—injunction, the request for injunctive relief is “subject to a heightened

23
 24
 25 ³ The Ninth Circuit observes a “sliding scale” approach, in that these elements “are
 26 balanced, so that a stronger showing of one element may offset a weaker showing of
 27 another.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Thus,
 28 by example, an injunction can issue where there are “serious questions going to the merits”
 and a balance of hardships that tips sharply towards the plaintiff . . . so long as the plaintiff
 also shows that there is a likelihood of irreparable injury and that the injunction is in the
 public interest.” *Id.* at 1135.

scrutiny and should not be issued unless the facts and law clearly favor the moving party.”
Dahl v. HEM Pharms. Corp., 7 F.3d 1399, 1403 (9th Cir. 1993).⁴

Plaintiff’s allegations that Defendants plan to sell the horses as soon as July 14, 2022 leads the Court to find that Plaintiff is likely to suffer irreparable harm in the absence of a TRO pending a hearing on the merits of a preliminary injunction. If Plaintiff’s allegations are taken as true, the captured horses are not “unauthorized livestock” that are subject to capture and sale by the federal government, but rather they are wild, free-roaming horses that are protected by several federal laws and that should remain in the Apache National Forest. If a TRO is not issued, the horses would be sold and permanently removed from their Apache National Forest habitat before any determination could be made as to whether they are “unauthorized livestock” or if they are instead federally protected, wild, free-roaming horses. The allegations in Plaintiff’s verified complaint demonstrate that Plaintiff has a strong likelihood of success on the merits of its claims under the National Environmental Policy Act, the Wild Free-Roaming Horses and Burros Act of 1971, and the Administrative Procedures Act. The allegations in Plaintiff’s verified complaint also demonstrate that the balance of the equities in this case clearly tips in favor of maintaining the status quo. In the absence of a TRO, the horses could be sold and there would be no recourse or meaningful remedy for Plaintiff, even if it is later determined—at the preliminary injunction hearing or during litigation—that the horses are federally protected, wild, free-roaming horses. Conversely, Defendants would not face any obvious hardship if a TRO were issued because the sale of the horses could always be held at a later date if it is determined that the horses are indeed “unauthorized livestock.” Finally, the Court finds that a TRO would protect the public interest by maintaining the status quo until a

⁴ “A mandatory injunction orders a responsible party to take action,” while “a prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (internal quotation marks omitted). “The ‘status quo’ refers to the legally relevant relationship between the parties before the controversy arose.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060–61 (9th Cir. 2014).

1 preliminary injunction hearing can be held.

2 The Court finds that Plaintiff has sufficiently met all four prongs that are required
3 for a TRO to issue. However, Plaintiff requests that the TRO issue *without notice*, which
4 creates an additional level of analysis for the Court. Unlike a preliminary injunction, *see*
5 Fed. R. Civ. P. 65(a), a TRO *may* be entered “without written or oral notice to the adverse
6 party,” Fed. R. Civ. P. 65(b). A TRO may issue, *ex parte*, only where there are:
7 “(A) specific facts in an affidavit or a verified complaint clearly show that immediate and
8 irreparable injury, loss, or damage will result to the movant before the adverse party can
9 be heard in opposition; and (B) the movant’s attorney certifies in writing any efforts made
10 to give notice and the reasons why it should not be required.” Fed. R. Civ. P. 65(b).

11 Here, Plaintiff has met both requirements. As to the first, Plaintiff attaches a verified
12 complaint (Doc. 13-1 at 2–22) to the Motion that—as discussed above—clearly shows that
13 immediate and irreparable harm will result as soon as July 14, 2022, which is before
14 Defendants could be heard in opposition. As to the second requirement, Plaintiff’s counsel
15 submitted a Declaration (Doc. 13-4 at 2–5) in which he certifies that he is unsure whether
16 it will be possible to effectuate timely formal service given “the immediacy of the
17 impending sale.” (*Id.* at 3). He asserts that his office “did make an attempt at informal
18 notice” when attorney Rita M. Gara called Defendant Judy Palmer on July 11, 2022 and
19 left a voicemail message. (*Id.*). Moreover, Plaintiff’s counsel asserts that “[f]urther
20 attempts at notice will be made, including the immediate forwarding of the Application
21 and its attendant documents to a process server in an attempt to provide formal service as
22 soon as possible.” (*Id.* at 4). All told, the Court is satisfied that Plaintiff has complied with
23 Rule 65(b)’s requirements for an *ex parte* TRO.

24 Accordingly,

25 **IT IS ORDERED:**

26 1. **TRO**: That Plaintiff’s Motion for Temporary Restraining Order (Doc. 13) is
27 granted to the extent Plaintiff seeks a TRO enjoining the sale of the horses. Plaintiff’s
28 Motion for Temporary Restraining Order (Doc. 13) is denied to the extent Plaintiff seeks

1 an Order to Show Cause why a preliminary injunction should not be issued. Defendants
2 United States Department of Agriculture, Tom Vilsack, United States Forest Service, and
3 Judy Palmer—as well as their officers, agents, servants, employees, attorneys, and any
4 person acting in concert or participation with them or acting at their direction or control,
5 directly or indirectly—are **prohibited from selling**, until further order of this Court, any
6 of the unclaimed, unbranded horses captured and removed from the Apache National
7 Forest and scheduled for sale on July 14, 20, and 21, 2022.

8 2. **Service**: That, no later than close of business on **July 13, 2022**, Plaintiff must
9 serve a copy on Defendants and file proof of service with the Court of the following: (1) the
10 Complaint; (2) the Motion for TRO and attachments; and (3) this Order.

11 3. **Hearing**: That a Preliminary Injunction Hearing is set for **July 22, 2022 at 1:30 p.m.**, before the Honorable Judge Steven P. Logan, United States District Judge, in
12 the Sandra Day O'Connor United States Courthouse, located at 401 West Washington
13 Street, Phoenix, Arizona 85003, 5th Floor, Courtroom 501.

14 4. **Briefing**: That Defendants shall have until the close of business on **July 18, 2022** to file any Response to Plaintiff's Motion; Plaintiff shall have until the close of
15 business on **July 20, 2022** to file any Reply in support of their Motion.

16 5. **Joint Notice**: That the parties shall file a Joint Notice by **July 15, 2022**,
17 indicating whether the motion may be decided on the briefing and argument of counsel
18 alone.

19 6. **Proposed Injunction**: That Plaintiff shall submit a proposed form of
20 preliminary injunction no later than **July 18, 2022**.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 7. **Warning:** That if Defendants do not respond to the Motion for a
2 TRO/Preliminary Injunction or fail to appear at the above-scheduled hearing, the Court
3 will deem such failure as consent to granting the motion, *see* LRCiv 7.2(i).

4 Dated this 12th day of July, 2022.

Stev. Logan
Honorable Steven P. Logan
United States District Judge